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SUPREME COURT, U.S.

NO. 82-833

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE CLAYTON SIMPSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Willie Clayton Simpson, respectfully opposes the petition for a writ of certiorari filed on November 12, 1982 by petitioner, State of Florida, seeking review of the decision of the Supreme Court of Florida in this case. This brief in opposition is being filed as provided by Rule 22.1 of the Rules of this Court.

CITATION TO OPINION BELOW

The opinion of the lower court in this case is reported as Simpson v. State, 418 So.2d 984 (Fla. 1982).

STATEMENT OF THE CASE

The pertinent facts of this case are set forth in the opinion of the Supreme Court of Florida appended to the petition for a writ of certiorari (4a, 8a-10a).

Further, respondent specifically and catagorically

denies, as being untrue, argumentative and unsupported by the record the petitioner's assertion that "while he was incarcerated awaiting trial for that murder, be formulated a plan by which he could obtain immunity for the first murder." (Pet. at 6). Respondent likewise denies the characterizations by petitioner arising from the above statement. Respondent also denies petitioner's claim that respondent "had not received his Miranda warnings, and was not even a suspect for the crime for which he was ultimately convicted." (Pet. at 10).

As to petitioner's argument in its "Statement of Facts" that this Court should consider extrarecord materials, it is submitted that this Court should reject petitioner's belated efforts as did the Supreme Court of Florida. Regardless, as discussed infra, petitioner's efforts are based upon a misperception of the issue involved, and for that reason should be disregarded.

Respondent adds the following facts to petitioner's Statement of the Facts: Respondent was a suspect in this case during the time the police officers spoke with him (at least as early as January, 1975) (e.g. Trial Trans. 102-103); respondent was given "Miranda warnings" on at least three occasions when the officers spoke with him about this case; respondent was represented by counsel; immediately after the prosecutor's discussion in the trial concerning respondent's refusal to testify because of an alleged desire for immunity (Trial Trans. 603-604), the prosecutor discussed a co-defendant's testimony before the grand jury and whether he had been granted immunity (Trial Trans. 604-605) and there were numerous other references during the

trial to the grand jury investigating the instant case (Trial Trans. 10, 15, 61, 309, 372, 395, 406-407, 412, 658); respondent did not testify at any preliminary proceeding in this case, including the grand jury.

REASONS THAT THE WRIT SHOULD BE DENIED

The lengthy and elaborate certiorari petition in this case misconstrues the issue involved in its attempt to create a colorable federal question. Contrary to its position in the lower court, petitioner now characterizes the question as one involving post-arrest/pre-arrest silence and attempts to rely upon Jenkins v. Anderson, 447 U.S. 231 (1980) for the proposition that pre-arrest silence may be used to impeach a defendant.

However, the issue in this case is not one involving simple pre-arrest silence. The present case involves refusal to testify in a court proceeding concerning this case.[1/] The

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1/ Accordingly, the Florida Supreme Court's decisions regarding post-arrest silence that are relied upon by petitioner, are not apposite to the present case involving reference to respondent's refusal to testify at a preliminary proceeding. Those decisions -- Bennett v. State, 316 So.2d 41 (Fla. 1975) and Jones v. State, 200 So.2d 274 (Fla. 3d DCA 1967) -- concern a different situation than that of the present case, and were correctly decided, as petitioner concedes. (Pet. at 17). As will be discussed herein, the issue regarding reference to refusal to testify is plainly state-law based. And although not involved in the instant case, it can be noted that the Florida courts' position with regard to post-arrest silence is likewise state-law based: "as a matter of state constitutional law, it is impermissible to comment on a defendant's post-arrest silence whether or not the silence is induced by Miranda warnings." Lee v. State, ___So.2d___, 1982 F.L.W. 2311 (Fla. 3d DCA November 2, 1982). This position is based upon state law and policy, e.g. Webb v. State, 347 So.2d 1054, 56 (Fla. 4th DCA 1977), as expressly authorized by this Court in Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490, 494 (1982). See also Jones v. State, supra, 200 So.2d at 577 (where the court states that its holding is based upon "the administration of justice"). Nevertheless, the instant case involves the refusal to testify, not post-arrest silence, and is expressly state-law based.

refusal to testify has been plainly differentiated from silence at arrest by the Florida Courts. The ruling below is solidly based upon an interpretation of a 75 year old state statute (now criminal rule) and an almost 50 year old precedent interpreting that statute. This state law precedent well preceded Miranda v. Arizona, 384 U.S. 436 (1966), and Doyle v. Ohio, 426 U.S. 610 (1976) that petitioner now claims are the bases for the Florida Supreme Court's decision in the instant case. To the extent that Miranda and Doyle have been cited in more recent opinions, they have been examined for "general policy" expressions, not for federal constitutional precedent relating to the comment on refusal of a defendant to testify. The failing of petitioner's current arguments is its confusion of pre-arrest-silence "apples" with refusal-to-testify "oranges".

The state statute in question is one that expressly prohibits comment on a defendant's failure to testify. The question in interpreting that state statute when it was enacted decades ago was whether its prohibition on comment on failure to testify extended beyond failure to testify at trial in also prohibiting comment on failure of a defendant to testify at pre-trial proceedings. The Supreme Court of Florida in 1939 held that the statutory prohibition extended to comment on a defendant's failure to testify at preliminary proceedings. In Simmons v. State, 139 Fla. 645, 190 So. 756 (1939) the Florida Supreme Court interpreted the 1927 law:

> "This statute applies to comment on the failure of the accused to testify at a preliminary hearing, an application for bail, a habeas corpus hearing or a former trial, as well as his failure to testify in the present trial."

(Emphasis supplied) 190 So. at 757. The Court further explained that allowing comment on failure to testify at a preliminary proceeding "deprives the defendant of the protection the statute was intended to secure ..." (Emphasis supplied) Id. See also Trafficante v. State, 92 So.2d 811 (Fla. 1957) ["This statute has been on the books for many years, and this court is firmly committed to the rule that a violation of it cannot be cured by our harmless error statute." (emphasis supplied)].

The decision in Simmons was based solely and squarely upon an interpretation and application of the state statute. And it was upon Simmons that the Florida Supreme Court based its holding in Willinsky v. State, 360 So.2d 760 (Fla. 1978). The holding in Willinsky was that Fla.R.Crim.P. 3.250,[2/] the successor to the statute reviewed in Simmons, prohibited disclosure of an accused's failure to testify at

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2/ Rule 3.250, Florida Rules of Criminal Procedure, provides as follows:

> "In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses, but no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf, and a defendant offering no testimony in his own behalf except his own, shall be entitled to the concluding argument before the jury.

a preliminary hearing. The holding in Willinsky was based squarely upon Simmons, the state statute and state policy grounds:

> In our opinion, the rule in Simmons v. State, supra, was correct. The reinstatement of this rule has in its favor the simplicity of operation and serves as an additional inducement to prosecutors and law enforcement officers when giving testimony to follow the dictates of Simmons, supra, by taking from them all hope that any useful advantage would be gained by intimating that defendant exercised his right to remain silent during any preliminary stage of the proceedings.

(Emphasis supplied). 360 So.2d at 763. The Florida Supreme Court in Willinsky did refer to this Court's decision in Doyle v. Ohio, supra and United States v. Hale, 422 U.S. 171 (1975). The Court expressly recognized the difference between the "silence at arrest" questions reviewed in those decisions and the refusal to testify situation at issue in Willinsky and herein. The Florida Supreme Court thus referred only to the "language" in those cases as "reflect[ing] general policy." 360 So.2d at 762. The decision in Willinsky was not based upon an application of the Fifth Amendment as petitioner now claims,[3/]

3/ Petitioner claims in its attack on the Florida Supreme Court rulings that the court "inexplicably refused to recognize that Doyle was decided upon due process grounds" not on the Fifth Amendment (Pet. at 16, n.2). Petitioner is flatly wrong as shown by the quote from Willinsky v. State, supra in the opinion below (7a) where the court expressly states its understanding that Doyle was grounded on due process. Petitioner is lifting a phrase out of context in order to invent a federal issue. The reference in the opinion below to the Florida Supreme Court's position "with respect to the Fifth Amendment" (5a) uses the words "Fifth Amendment"

but was grounded solidly upon state policy and state statutory law. And it is upon Willinsky that the decision below is based.[4/]

Accordingly, the present case involves a question of application of state law with decades of state decisional precedent. The Florida courts are applying Florida law consistently with Florida practice and procedure. The Florida court below thus did exactly what this Court has expressly authorized it to do:

> "Our decision today does not force any state court to allow impeachment through the use of pre-arrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial."

Jenkins v. Anderson, 447 U.S. 231, 240 (1980). Accord Fletcher v. Weir, ___U.S.___, 71 L.Ed.2d 490, 494 (1982).

Therefore, the present case is not proper for the exercise of this Court's certiorari jurisdiction as no federal question is presented.

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The fact that the opinion of the Florida Supreme Court below does not fully detail the state law bases for its ruling

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Footnote 3/ continued:

"as a generic and commonly used reference to the right [to remain silent] as found in both the State and Federal Constitutions." Lee v. State, supra, n.3. The reference to the Fifth Amendment thus relates to whether the right against self-incrimination is applicable, but the determination of whether to allow comment on the exercise of that right is based upon state law grounds.

4/ The decision below is plainly based upon Willinsky as it involves the same situation as involved in the present case. The references to Bennett v. State, supra and Jones v. State, supra, are simply statements of policy that the Florida courts do not apply harmless error reasoning to such errors. See also footnote 1, supra.

except by citation to its prior decisions, is because the issue was not raised by petitioner inthe Florida Supreme Court. Petitioner conceded the error in its brief before the Florida Supreme Court and put forth only two arguments in its brief in the court below: (1) that the issue had not been properly preserved for appeal under state procedural rules; and (2) that even were it properly preserved for review, the Florida Supreme Court should re-examine its prior decisions holding that such error would not be held to be harmless. The petitioner thus did not raise the issue in its brief that it seeks to raise in this Court.[5/] Therefore the Florida Supreme Court's opinion addresses only the two issues set out above. It was only after the Florida Supreme Court decided against it on those issues that petitioner tried to create a new question.[6/] The petitioner tries to take advantage of a situation of its own making

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5/ Thus, petitioner's argument that "there was no mention of the Florida Constitution or of any Florida evidentiary rule" in the lower court's opinion (Pet. at 23) is particularly misplaced and to no avail. The lower court addressed precisely the issues raised by petitioner and petitioner now cannot be heard to find fault in the court's failure to fully detail a question it did not raise and in fact conceded. The fact is that the lower court did rely upon its previous decision in Willinsky v. State, supra, which did show the state law basis for its ruling.

6/ Petitioner raised no argument regarding the substance of the question until its motion for rehearing (and even then treated it incorrectly as involving pre-arrest silence rather than reference to the refusal or failure to testify). It was also on rehearing that petitioner sought to have the Florida Supreme Court consider extrarecord materials. The Florida Supreme Court rejected those efforts and denied rehearing. Although the opinion was modified, it was modified on the basis of a special, separate motion filed by the original prosecutor in the case who is now a state circuit judge asking for personal reasons that some critical language relating to

by lifting bits and pieces from the Florida Supreme Court's opinion out of context and then trying to create a false and incomplete trial of Florida precedent in order to invent a federal question where there clearly is none. Such a disingenuous switch of positions should not be countenanced and should be rejected by this Court as it was by the Florida Supreme Court. Likewise, this Court should rebuff the efforts by petitioner to have this Court consider materials not contained in the appellate record below as did the Florida Supreme Court.[7]

• • •

Petitioner's second contention, that this Court

Footnote 6/continued:

the prosecutor as being "overzealous" be omitted from the published opinion -- no other modifications were made in the opinion. Accordingly, the Florida Supreme Court flatly rejected petitioner's efforts to inject some new issue into the case and to have it consider extrarecord materials. This Court should likewise reject those efforts.

7/ Further, in this regard, the state's efforts through the extrarecord material to show that the comment actually referred to respondent's refusal to testify in a preliminary hearing investigating this case rather than the grand jury investigating this case, lends no support to its argument. First, as previously discussed, the state statutory provision prohibits reference to refusal to testify at any preliminary proceeding. Second, as found by the lower court, the examination and argument of the prosecutor taken in context is readily susceptable to an interpretation referring to respondent's refusal to testify before the grand jury -- and this is the standard for judging comments under the state statutory prohibition. See, e.g. Trafficante v. State, 92 So.2d 811, 814 (Fla. 1957) [such comment is reversible error "if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction." (emphasis supplied). Lastly, the facts remain -- regardless of whether the references involved the preliminary hearing or the grand jury -- that the comments concerned respondent's refusal to testify at a time when he was a primary suspect in the case, had at least three times been given Miranda warnings regarding this case, was in custody and was acting under the advice of counsel.

should exercise its certiorari jurisdiction to overrule Florida's application of its own harmless error rule, patently raises no federal question. Florida's refusal to apply a harmless doctrine is based upon a state policy determination with lengthy precedent. As petitioner notes, Florida courts have decided that a harmless error rule should not be applied in Florida in errors of this type as a "prohylactic rule" as "an additional inducement to prosecutors" to avoid such error "by taking from them all hope that any useful advantage would be gained" by referring to a defendant's silence at a preliminary proceeding. Willinsky v. State, 360 So.2d 760, 763 (Fla. 1978). This likewise had been the ruling in 1939 in Simmons v. State, supra where the Florida Supreme Court was interpreting its state statute. See also Trafficante v. State, 92 So.2d 811 (Fla. 1957). The application or nonapplication of a harmless error rule is a matter exclusively within the provence of the state courts. Contrary to petitioner's assertions, the case of United States v. Hastings, 660 F.2d 301 (7th Cir. 1981), cert.gtd, ___U.S.___, 102 S.Ct. 2232, 72 L.Ed.2d 844 (1982), does not involve any issue relevant to the present case. The Hastings case concerns federal courts and federal practice and procedure and an interpretation of 28 U.S.C. §2111 and Fed.R.Crim.P. 52(a). The Florida practice regarding harmless error is not based upon a federal constitutional ground but rather upon state law and practice. For that reason no federal question is presented.

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In summary, the present case is not appropriate for

the exercise of this Court's certiorari jurisdiction as it presents no federal question. Petitioner has misconstrued the issue that was involved in this case in an attempt to create a federal question and in its attempt it asks this Court to parse and reparse a record already reviewed by unanimous Florida Supreme Court and impermissibly asks this Court to consider issues that it did not properly raise below and to consider extrarecord materials. There is no basis for invoking the certiorari jurisdiction of this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
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224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent

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CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served copies of Respondent's Brief in Opposition, Motion for Leave to Proceed In Forma Pauperis and the Affidavit in the above case on counsel for petitioner by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Hon. Raymond L. Marky
Assistant Attorney General
Department of Legal Affairs
The Capitol, 1502
Tallahassee, Florida 32301

All parties required to be served have been served. Done this 16th day of DECEMBER, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, WILLIE CLAYTON SIMPSON, who is now imprisoned, asks for leave to file the accompanying Brief in Opposition to Petition for a Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Respondent sought and was granted leave to proceed in forma pauperis in the Supreme Court of Florida below. Respondent has attached hereto his affidavit in substantially the form prescribed by Fed.R.App.P., Form 4.

Respectfully submitted,

RICHARD L. JORANDBY
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224 Datura Street - 13th Floor
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(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent

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Respondent.

A F F I D A V I T

I, WILLIE CLAYTON SIMPSON, being first duly sworn according to law, depose and say, in support of my motion to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death in the Circuit Court of Duval County, Florida. I appealed the conviction and sentence to the Supreme Court of Florida. That Court vacated my conviction and ordered a new trial. The petitioner, State of Florida, is now petitioning for a writ of certiorari in this Court.

I swear that the above is true and correct.

Willie Clayton Simpson
WILLIE CLAYTON SIMPSON

N P SEAL

Sworn to and subscribed
before me this 1 day
of Dec., 1982.

Notary Public

My commission expires:
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPT 30 1985
BONDED THRU GENERAL INS. UNDERWRITERS

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A F F I D A V I T

This is to certify that I, Craig S. Barnard, a member of the Bar of this Court, deposited Respondents Brief in Opposition in the above-styled cause, in the United States mail, first class postage prepard, at the Main Branch of the United States Postal Service Office, on December 16, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender

COUNSEL FOR RESPONDENT

STATE OF FLORIDA)
SS:
COUNTY OF PALM BEACH)

SWORN TO AND SUBSCRIBED before me on this 16th day of DECEMBER, 1982.

Sali W. Johnson
Notary Public
State of Florida At Large

My Commission Expires: Notary Public, State of Florida at Large My Commission Expires May 8, 1983